

OCT 28 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL INGRAM,

Defendant - Appellant.

No. 04-10549

D.C. No. CR-03-00358-FMS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted June 17, 2005
San Francisco, California

Before: REAVLEY,** T.G. NELSON, and RAWLINSON, Circuit Judges.

At approximately 8:58 p.m., a United States Park Police Officer noticed a lone vehicle parked at an “awkward angle.” The officer decided to conduct a

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

“welfare check” of the car’s occupants. He approached the driver’s side of the vehicle, while another officer approached from the passenger’s side. Both men were in full uniform and armed. When the officer reached the front driver’s side window, he directed Samuel Ingram to roll down his window. When Ingram complied, the officer was immediately engulfed by the distinct odor of marijuana. Ingram subsequently moved to suppress the evidence found in his vehicle as fruits of an unlawful search and seizure.

A seizure occurs for purposes of the Fourth Amendment when, “taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004) (citation and internal quotation marks omitted).

The fact that the government labels this encounter a “welfare check” is not controlling. The appropriate inquiry is whether a reasonable person in Ingram’s position would feel free to ignore the officer’s order. Under the circumstances of this case, we hold that a reasonable person would not feel free to ignore the command, and a seizure occurred. *See id.* Absent reasonable suspicion justifying

the seizure, a Fourth Amendment violation occurred. *See INS v. Delgado*, 466 U.S. 210, 216 (1984).

We do not agree with our dissenting colleague that the seizure can be justified as a permissible exercise of the community caretaking function expected of police officers. Once the officers were able to observe that the passengers were in no distress of any kind, no “reasonable grounds [existed] to believe that there [was] an emergency at hand and an immediate need for their assistance for the protection of life or property.” *United States v. Cervantes*, 219 F.3d 882, 888 (9th Cir. 2000). Because the government conceded the absence of reasonable suspicion and because a seizure occurred, the motion to suppress should have been granted.

REVERSED and REMANDED.